(3)

No. 98-912

FILED
JAN 25 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARVIN O. ROSS,

Petitioner,

vs.

INDIANA STATE TEACHERS ASSOCIATION and
INDIANA STATE TEACHERS ASSOCIATION
INSURANCE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INDIANA STATE TEACHERS ASSOCIATION

WAYNE O ADAMS III
Counsel of Record
DAVID D. ROBINSON
STEVEN F. POCKRASS
MARK W. FORD
JANE ANN HIMSEL
JULIE M. CONRAD
JOHNSON SMITH PENCE DENSBORN
WRIGHT & HEATH LLP
Attorneys for Respondent Indiana State Teachers Association
1800 One Indiana Square
Indianapolis, Indiana 46204
(317) 634-9777

150923

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2 Pgs

PARTIES TO THE PROCEEDING

The caption of the petition accurately identifies the parties to the proceeding. Respondent Indiana State Teachers Association is a not-for-profit corporation. It has no parent company and has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Nature of the Case	1
B. Course of Proceedings	2
C. Statement of Relevant Facts	4
Reasons for Denying the Writ	8
I. This Case Bears No Resemblance To *Cleveland v. Policy Management Systems Corporation.*	9
II. The Issue Presented By Petitioner Is Not Outcome-Determinative.	15
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Blanton v. Inco Alloys International, Inc., 123 F.3d 916 (6th Cir. 1997) 14

Cleveland v. Policy Management Systems Corporation, 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998) 9, 10, 13, 14, 15

Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998) 12

Johnson v. Oregon Department of Human Resources Rehabilitation, 141 F.3d 1361 (9th Cir. 1998) 14

Rascon v. U.S. West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998) 14

Swanks v. Washington Metropolitan Area Transit Authority, 116 F.3d 582 (D.C. Cir. 1997) 14

Talavera v. School Board of Palm County, 129 F.3d 1214 (11th Cir. 1997) 14

Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997) 12, 14

Cited Authorities

Page

Statutes:

29 U.S.C. § 1001 *et seq.* 1

42 U.S.C. § 12101 *et seq.* 1

Rules:

Fed. R. Evid. 401 13

Fed. R. Evid. 402 13

United States Supreme Court Rule 10 13

Other Authorities:

EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits On the Determination of Whether a Person is a Qualified Individual With a Disability Under the Americans With Disabilities Act of 1990, EEOC Notice 915.002, Feb. 12, 1997 14

Robert L. Stern et al., Supreme Court Practice, § 6.37 (7th ed. 1993) 16

APPENDIX

Page

Appendix A — Order Of The United States District Court For The Northern District Of Indiana, Fort Wayne Division Dated September 24, 1997 ..... 1a

STATEMENT OF THE CASE

A. Nature of the Case

This petition seeks this Court's review of the Seventh Circuit's opinion in favor of the two Respondents, the Indiana State Teachers Association ("ISTA") and the Indiana State Teachers Association Trust ("ISTA Trust"). Petitioner asks this Court to consider two separate questions, one directed toward each Respondent. First, Petitioner asks this Court to reverse the Seventh Circuit's decision affirming summary judgment on Petitioner's claim against ISTA, his former employer, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Second, Petitioner asks this Court to overturn the Seventh Circuit's ruling in favor of the ISTA Trust on his claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

Respondents ISTA and the ISTA Trust are separate legal entities and are represented by separate counsel. Therefore, ISTA will respond only to the first question presented by Petitioner:

> What weight, if any, should be given to a person's actions or statements in seeking or receiving disability insurance benefits when that person asserts that he is a "qualified individual with a disability" under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*

ISTA objects to this question, as it is not presented by the facts of this lawsuit.

Moreover, the Petition itself does not truly address this question. Instead, it falsely portrays this matter as one that turns

on the issue of judicial estoppel. In a strained attempt to make this case appear similar to one in which certiorari already has been granted, Petitioner has mischaracterized the nature of the Seventh Circuit's decision and has omitted highly relevant information from his description of the course of proceedings. Quite simply, neither the District Court nor the Court of Appeals relied upon the doctrine of judicial estoppel in reaching the non-controversial conclusion that Petitioner had failed to create a genuine issue of material fact that would allow him to pursue an ADA claim against ISTA. Furthermore, the issue of judicial estoppel previously was raised by Petitioner in a Motion to Amend Judgment. In response to that Motion, the District Court expressly stated that its summary judgment decision was based on an analysis of the evidence, not on the doctrine of judicial estoppel. Similarly, the Seventh Circuit affirmed summary judgment on multiple grounds, none of which included judicial estoppel.

Far from constituting a travesty of justice, this is a case about a disabled employee who was accommodated by ISTA long before the ADA became effective; who continued to be accommodated by ISTA after the ADA went into effect; who consistently has admitted that he was unable to perform one of the essential functions of his job; who refused to accept a package of accommodations offered to him because it did not include the elimination of an essential job function; and whose employment was terminated after he would not and could not provide a medical release that would allow him to return to work. In addition to being correctly decided, this case presents no compelling reasons for granting certiorari.

B. Course of Proceedings

Petitioner filed his Complaint against ISTA and the ISTA Trust on July 27, 1995. On February 7, 1997, the District Court

issued a Memorandum and Order granting ISTA's Motion for Summary Judgment on Petitioner's ADA claim. Six months later, on August 14, 1997, Petitioner filed a Motion to Amend Judgment. Therein, Petitioner argued that the District Court should reinstate Petitioner's claim because another judge in the Northern District of Indiana had overruled a prior holding that a claim of disability for benefit purposes was an absolute bar to a subsequent ADA claim.

On September 24, 1997, the District Court issued its Order denying Petitioner's Motion to Amend Judgment. Remarkably, no mention of this Order is made in the Petition, even though the District Court clearly stated in this Order that it had not relied on the doctrine of judicial estoppel when it granted summary judgment.

> This court did not find that Ross was estopped from making such an argument because of his receipt of Social Security benefits; rather, it determined that Ross' actions in obtaining Social Security and long term disability benefits were evidence that he was not a qualified individual with a disability, and thus not entitled to the protection of the ADA.

(Respondent's Appendix, 3a.)

In April 1997, the District Court conducted a bench trial on Petitioner's ERISA claim against the ISTA Trust. The District Court ruled in favor of Petitioner on the ERISA claim, and the ISTA Trust appealed that decision to the Seventh Circuit. Petitioner then filed a cross-appeal of the District Court's decision granting summary judgment to ISTA.

On September 3, 1998, the Seventh Circuit affirmed, on multiple grounds, the District Court's grant of summary

judgment in favor of ISTA. *Ross v. Indiana State Teachers Association and Indiana State Teachers Association Insurance Trust*, 159 F.3d 1001 (7th Cir. 1998). The Seventh Circuit held that ISTA engaged in an interactive process with Petitioner, and that Petitioner caused the process to break down. The Seventh Circuit also found that Petitioner was not a qualified individual with a disability because he and his physician consistently maintained that he could not perform one of the essential functions of his job, which was to attend meetings at the school buildings in the geographical area Petitioner serviced. Furthermore, the Seventh Circuit found that ISTA had attempted to reasonably accommodate Petitioner by agreeing to most of the accommodations that Petitioner had requested. However, Petitioner refused to return to work because ISTA would not agree to his unreasonable request that one of his essential job functions be eliminated. Finally, the Seventh Circuit found that Petitioner refused to satisfy ISTA's reasonable request that Petitioner provide a medical release indicating his ability to return to work.

C. Statement of Relevant Facts

ISTA is a labor organization representing teachers in the State of Indiana. ISTA employs full-time professional staff, known as UniServ Directors, to provide guidance and assistance to the officers and members of the local bargaining units. From the time he joined ISTA in 1972, Petitioner worked as a UniServ Director for ISTA's Fort Wayne, Indiana office. In this position, Petitioner was responsible for representing the Fort Wayne Education Association (FWEA) and its teacher members. Petitioner's job description and performance expectations required him to establish a program to visit the 54 schools in his service area, to meet with teachers at their respective schools, and to attend a wide range of events at the schools and at other facilities throughout the community.

Petitioner suffers from a degenerative hip condition which has caused him orthopedic problems since 1958. At the time Petitioner became employed by ISTA in 1972, several ISTA managers were aware of Petitioner's orthopedic problems, but none ever expressed any doubts or reservations about his ability to perform his job.

Over the next two decades, ISTA continuously employed Petitioner in the Fort Wayne UniServ Director position. During this period, ISTA allowed Petitioner time off for numerous surgeries and therapy sessions and also provided him with various other accommodations. However, on September 29, 1992, Petitioner's physician, Dr. M.E. Cabanela, wrote the following report regarding Petitioner:

> I believe he is having significant enough symptoms so that he cannot function effectively at work and, therefore, he should be taken off work on an indefinite basis. I think that his condition is such so that it is permanent.

On October 2, 1992, Petitioner informed his immediate supervisor that his physician had directed him to take an indefinite sick leave. Petitioner quoted his doctor's recommendation that he should immediately stop working on a "permanent basis." Petitioner underscored these quoted words, attached a copy of Dr. Cabanela's letter, and stated that he intended to adhere to this medical directive. Petitioner also applied for disability benefits from the Social Security Administration. On his benefits application, Petitioner emphasized that his job required him to conduct daily meetings outside his office and that he could not fulfill this job requirement.

Soon after Petitioner announced that he intended to stop working on a permanent basis, ISTA posted a vacancy for the UniServ Director position in Fort Wayne. However, Petitioner then expressed his hope of returning to this position after he underwent surgery, and ISTA agreed to delay filling this position until Petitioner received a post-operative prognosis from his doctor. On September 1, 1993, when Petitioner still could not tell ISTA if he would be able to return to his position, ISTA hired another UniServ Director to fill the vacancy.

On October 11, 1994, the third party administrator for Petitioner's long term disability policy informed Petitioner that an independent medical examination revealed he was not totally disabled from his occupation and was no longer eligible for benefits based on his ability to return to work with accommodations. Faced with the termination of these benefits, Petitioner's union representative telephoned ISTA and stated that Petitioner was ready to return to work. ISTA responded that it had a vacant UniServ Director position in its Shelbyville, Indiana office, and inquired as to what accommodations Petitioner would require in order to return to work.

On October 28, 1994, the union representative forwarded a list of 16 proposed accommodations to ISTA. These proposals included a demand that all meetings with teachers be conducted at Petitioner's UniServ office, rather than at the schools or at other locations in the community. On November 10, 1994, Petitioner's family physician, Dr. Phillip J. Johnson, sent a letter to ISTA expressing serious reservations about Petitioner's ability to return to work. Dr. Johnson stated that in his opinion, Petitioner should not return to work, and he emphasized that all 16 of the accommodations proposed by Petitioner would be required if he were to return. Dr. Johnson concluded: "Forcing

him to work with less than all the above accommodations would place Mr. Ross at risk for incurring severe injury."

On November 18, 1994, ISTA agreed to most of the 16 requested accommodations, informed Petitioner that some of the requested accommodations were out of its control, and refused to provide the requested accommodation that all meetings with teachers be held at the UniServ office. Petitioner had mailed a letter to ISTA dated November 16, 1994, which ISTA received on November 21, 1994, stating that Petitioner would report to work, as he had "no intention of being insubordinate." However, Petitioner also stated in the letter that he had never suggested that he was physically able to return to work, and that his doctor had not released him to return to work. Based on this letter, it was clear that Petitioner had not been released to return to work as had been represented to ISTA. On November 23, 1994, ISTA instructed Petitioner not to report to work until such time as he could provide a written release from his physician stating that he was able to return and could perform the essential functions of his position without posing a threat of harm to himself or others. Petitioner was informed that his employment would be terminated if such a release were not provided to ISTA by December 2, 1994.

On November 29, 1994, Petitioner's attorney wrote a letter to ISTA emphasizing that Petitioner's physicians had not released him to return to work except under the "very restricted circumstances" outlined by Petitioner. Petitioner's attorney also opined that Petitioner was "incapable of safely performing the ordinary duties of his job."

Petitioner failed to provide a release from his physician and did not even attempt to obtain such a release until after December 3, 1994. Dr. Johnson later reviewed ISTA's request for the release and signed a statement which concluded, "[t]he above request made by Mr. Ross's employer is something I

could not and would not agree to sign." Petitioner admits that it was impossible for him to obtain such a release to return to work. On December 4, 1994, ISTA informed Petitioner that his employment had been terminated.

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari should be denied for two overriding reasons and several related reasons. First, the question presented in the Petition is not a question that is raised by the facts of Petitioner's case. Petitioner obviously is attempting to portray the instant matter as a judicial estoppel case because this Court recently granted certiorari in an ADA suit that does raise judicial estoppel questions. However, contrary to Petitioner's assertions, the instant matter does not involve the doctrine of judicial estoppel, as neither the District Court nor the Seventh Circuit gave preclusive effect to the fact that Petitioner sought disability benefits.

At its essence, this is a run-of-the-mill ADA case in which Petitioner, his doctors, and his lawyer all admitted that Petitioner could not perform an essential function of his job. Petitioner consistently took the position prior to and during this litigation that he could not and would not return to work unless that essential job function was eliminated, which clearly means he is not entitled to ADA protection because he is not a qualified individual with a disability. Petitioner's obvious desire to overturn a factual finding in his own case clearly does not warrant a grant of certiorari by this Court. Petitioner does not present any cases that directly conflict with the Seventh Circuit's ruling on his ADA claim. There is no circuit split applicable to the facts of this case, and there is nothing unique or unusual about the application of the law to the facts.

Second, the question presented by Petitioner is not outcome-determinative. Notably, Petitioner and his representatives made statements outside the context of his disability benefits applications which showed he could not perform at least one essential function of his job. Furthermore, the Seventh Circuit made multiple findings affirming summary judgment which would preclude Petitioner from recovering under the ADA even if certiorari were granted on the question presented. In addition to determining that Petitioner was not a qualified individual with a disability, the Seventh Circuit also held that Petitioner caused the interactive process to break down and that ISTA did not fail to reasonably accommodate Petitioner.

I.

THIS CASE BEARS NO RESEMBLANCE TO *CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORPORATION.*

Petitioner places great emphasis on the fact that the Supreme Court recently granted certiorari in *Cleveland v. Policy Management Systems Corporation*, 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998). In that case, the Fifth Circuit held that the mere application for or receipt of Social Security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a qualified individual with a disability under the ADA. This Court granted certiorari to address the following two questions:

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting

that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA.

Cleveland, 119 S. Ct. 39 (1998). Petitioner contends that certiorari also should be granted in his case — or that a decision in his case should be held in abeyance pending a ruling in *Cleveland* — based upon Petitioner's representation that the two cases present similar issues.

Petitioner's attempt to piggyback on *Cleveland* is completely misguided. At no time did the Seventh Circuit state or imply that Petitioner's application for Social Security or long-term disability benefits was outcome-determinative. Unlike the Fifth Circuit in *Cleveland*, the Seventh Circuit made no mention of a rebuttable presumption or the doctrine of judicial estoppel. Rather, the Seventh Circuit simply found that Petitioner's own statements and representations "throughout this litigation" established that he could not perform the essential functions of his position and therefore could not be considered a qualified individual with a disability. (Petitioner's Appendix, hereafter "Pet. App.," A-36.)

Far from relying on the doctrine of judicial estoppel, the Seventh Circuit engaged in a detailed examination of Petitioner's job duties, and determined that Petitioner was not a qualified individual with a disability under the ADA.

> The essential job duties of a UniServ Director clearly involve meetings outside of the Director's office. Moreover, ISTA had established a school visitation program that was part of the Director's job function. There would be little point in having such a school visitation program for UniServ Directors if all of the teachers were required instead to meet the Director at his office. Given Mr. Ross' position that all of his requested accommodations were medically necessary and that at least one of those requests — that all meetings be held at his office — was clearly unreasonable, he has not demonstrated that he was willing or able to perform the essential functions of his job with reasonable accommodation. Accordingly, we conclude that the district court properly determined that Mr. Ross is not a "qualified individual with a disability."

Id. at A-36.

In arriving at this conclusion, the Seventh Circuit found that Petitioner, his physicians, and his lawyer consistently informed ISTA that Petitioner could only return to work if **all** of his requested accommodations were granted. (*Id.* at A-35.) One of those accommodations was Petitioner's demand that all meetings with teachers be held in his UniServ office. The Seventh Circuit noted that Petitioner "has acknowledged that a substantial portion of the essential job duties of a UniServ Director involves time spent outside of the office in meetings at various locations." *Id.* To illustrate Petitioner's acknowledgment that this was an essential job function, the Seventh Circuit, in a footnote, made the following reference to a factual statement made by Petitioner in his application for Social Security benefits.

> In his application for Social Security benefits, Mr. Ross explained that he averaged three meetings per day outside of the UniServ Director office in "Ft. Wayne schools (54 total in FW), the FWES administrative center, or other community facilities such as the Chamber of Commerce." R.87, Ex. 51. Moreover, Dr. Keating, the physician who conducted the IME, wrote in his report that Mr. Ross described his job as requiring him "to visit 55 schools within the Fort Wayne Community School District and that he only spends 35-40% of his time in his office." R.87, Ex. 72.

Id., n.17. This footnote contains the Seventh Circuit's only reference to Petitioner's application for Social Security benefits. As this footnote clearly demonstrates, the fact that Petitioner *applied* for such benefits was not the issue. Rather, the application contained admissible statements by Plaintiff regarding the essential functions of his job.[1]

Petitioner overlooks the fact that both the trial court and the Seventh Circuit stated that Petitioner had consistently represented "throughout the course of this litigation" that he was totally disabled. *Id.* Thus, unlike the cases in which the question of judicial estoppel is raised based upon sworn statements that are provided to the Social Security Administration to obtain disability benefits, both the District Court and the Seventh Circuit looked at the position the Petitioner actually was taking in the *instant* litigation. This is a significant distinction, and is wholly consistent with established federal case law.

---

1. To further illustrate that this case does not involve the doctrine of judicial estoppel, it should be noted that the Seventh Circuit's opinion did not even cite *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997) or *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998), the two leading Seventh Circuit decisions which have addressed this issue.

Petitioner's inappropriate comparison to *Cleveland* is an obvious attempt to divert this Court's attention from his real reason for seeking certiorari, *i.e.*, his frustration with the District Court's and the Seventh Circuit's factual findings. As is stated in Rule 10 of the Rules of the Supreme Court, a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Here, the district and appellate courts both found that Petitioner failed to create a genuine issue of material fact when he consistently maintained that there was an essential function of his position that he could not perform and that he refused to return to work unless that essential function was eliminated. Petitioner's unwillingness to accept this determination clearly does not warrant a grant of certiorari.

Furthermore, under the Federal Rules of Evidence, relevant factual assertions constitute admissible evidence. Fed. R. Evid. 402. Petitioner and his representatives informed ISTA that Petitioner could not hold meetings with teachers outside of his office. Those statements are relevant, *see* Fed. R. Evid. 401, and the Seventh Circuit properly considered them. Logically, these consistent statements in multiple contexts should support affirmance of summary judgment, not reversal. Yet Petitioner apparently believes that this Court should take the extraordinary and illogical step of granting certiorari so it can create a special exception to the evidentiary rules that would bar the admissibility of relevant factual statements contained in any type of disability application, and would make the admission of such evidence *per se* reversible error. Such an approach is completely contrary to the position taken by the Equal Employment Opportunity Commission and the federal courts. In fact, the EEOC has expressly recognized that factual statements made on Social Security disability applications are properly considered in determining whether someone is a qualified individual with a disability.

> Although representations made in connection with an application for disability benefits may be relevant to [a determination of whether a person is a "qualified individual with a disability"], they are never an absolute bar to a finding that a person is a "qualified individual with a disability" for purposes of the ADA.

See EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits On the Determination of Whether a Person is a Qualified Individual With a Disability Under the Americans With Disabilities Act of 1990, EEOC Notice 915.002, Feb. 12, 1997, p. 3.

Similarly, several Courts of Appeal that have rejected the doctrine of judicial estoppel in ADA cases have nevertheless held that statements made by a claimant in support of an application for Social Security or other disability benefits may properly be considered as evidence in the determination of whether the claimant is a qualified individual with a disability. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997); *Blanton v. Inco Alloys International, Inc.*, 123 F.3d 916, 917 (6th Cir. 1997); *Weigel v. Target Stores*, 122 F.3d 461, 467 (7th Cir. 1997); *Talavera v. School Board of Palm County*, 129 F.3d 1214, 1220 (11th Cir. 1997); *Johnson v. Oregon Department of Human Resources Rehabilitation*, 141 F.3d 1361, 1368 (9th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998).

In summary, the decision in the instant situation bears no similarity to the decision in *Cleveland*, and it would not make any sense to view the instant case as a companion case to *Cleveland*. The facts of the instant case are inapplicable not only to the question presented in *Cleveland*, but also to the

question that Petitioner seeks to present. The instant case does not present any compelling legal conflicts or issues that would merit this Court's granting certiorari. For these reasons, Petitioner's request for a writ of certiorari should be denied.

II.

THE ISSUE PRESENTED BY PETITIONER IS NOT OUTCOME-DETERMINATIVE.

Clearly, Petitioner would have this Court believe that if it modifies the rebuttable presumption approach taken by the Fifth Circuit in *Cleveland,* then perhaps a different decision would be reached in Petitioner's case. As has been discussed previously, *Cleveland* is inapplicable to the instant case. Thus, placing Petitioner's case in abeyance pending a decision in *Cleveland* would serve no useful purpose. In addition, Petitioner refuses to acknowledge that the Seventh Circuit affirmed summary judgment in favor of ISTA on multiple grounds, which further demonstrates that rulings on the questions presented in *Cleveland* and proposed by Petitioner will not change the result in Petitioner's case.

Significantly, the Seventh Circuit held that ISTA was not liable to Petitioner under the ADA because ISTA had not failed to reasonably accommodate him. The Seventh Circuit held that ISTA had offered Petitioner a package of reasonable accommodations, yet Petitioner refused to return to work unless additional accommodations were made. Moreover, the Seventh Circuit held that at least one of the accommodations demanded by Petitioner, *i.e.*, holding all meetings at the ISTA UniServ office, was unreasonable as a matter of law, because it would not have allowed Petitioner to perform an essential function of his job. The Seventh Circuit also held that Petitioner failed to comply with ISTA's reasonable request that Petitioner obtain

a release to return to work from his doctor after Petitioner informed ISTA, in writing, that his doctor had not yet released him to return to work. Because of this, the Seventh Circuit concluded that Petitioner was responsible for the breakdown in the interactive process. (Pet. App. A-37.) Thus, regardless of whether Petitioner was a qualified individual with a disability, ISTA was entitled to summary judgment because ISTA did not fail to reasonably accommodate Petitioner. This means that even if the question presented were resolved in Petitioner's favor, his lawsuit against ISTA still would fail. Significantly, where the lower court's decision is correct without regard to the question raised in a petition, the question raised by the petition generally does not rise to the level of importance sufficient to warrant a grant of certiorari. Robert L. Stern et al., Supreme Court Practice, § 6.37, p. 373 (7th ed. 1993).

Summary judgment is not a procedural shortcut, but rather is an important mechanism for promoting justice by terminating litigation where there is no genuine issue of material fact, and one party is entitled to judgment as a matter of law. In the instant case, summary judgment was granted in favor of ISTA. Therefore, consistent with the letter and the spirit of the Federal Rules of Civil Procedure, ISTA should not be required to expend additional time and resources addressing a question that is not outcome-determinative.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

WAYNE O ADAMS III
Counsel of Record
DAVID D. ROBINSON
STEVEN F. POCKRASS
MARK W. FORD
JANE ANN HIMSEL
JULIE M. CONRAD
JOHNSON SMITH PENCE DENSBORN
WRIGHT & HEATH LLP
Attorneys for Respondent Indiana State Teachers Association
1800 One Indiana Square
Indianapolis, Indiana 46204
(317) 634-9777

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED SEPTEMBER 24, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

No 1:95 cv 245 AS

MARVIN O. ROSS,

Plaintiff,

v.

INDIANA STATE TEACHER'S ASSOCIATION and INDIANA STATE TEACHER'S ASSOCIATION INSURANCE TRUST,

Defendants.

ORDER

This cause is before this court on Plaintiff Marvin Ross' Motion to Amend the Judgment under Rule 59(e)., FED.R.CIV.P. and Ross' Motion to Correct the Record pursuant to Rule 60(a), FED.R.CIV.P. The Indiana State Teachers Association (ISTA) has responded to the motions, and this court is now ready to rule.

A. Motion to Correct the Record

This court entered a final judgment in this cause on July 30, 1997. Pursuant to Rule 59(b), FED.R.CIV.P., motions to

amend judgments must be filed within ten (10) days of the entry of judgment. The computation of time under Rule 6(a), FED.R.CIV.P. thus required such a motion to be filed on August 13, 1997. Ross' counsel filed said motion in the Fort Wayne Filing Depository at approximately 7:30 p.m. on August 13, 1997. While this court had ordered filings in this cause to be made in the South Bend clerk's office, because the file had been reassigned to a South Bend judge, thus filing falls within the "time-sensitive" exception found in Local Rule 5.1(d), allowing filings to be made in any office of the clerk. The Fort Wayne Filing Depository qualifies as an office for this purpose, and thus the clerk is now ordered to correct the record to reflect a filing date of August 13, 1997 for plaintiff's Motion to Amend Judgment, Bill of Costs, and Motion for Attorneys Fees, all of which were filed in the Ft. Wayne Filing Depository on the night of August 13, 1997.

B. Motion to Amend Judgment

On February 11, 1997, this court entered judgment in favor of the ISTA and against Ross on Ross' Americans with Disabilities Act ("ADA") claim against the ISTA. On August 13, 1997, after the entry of a final judgment in the case, Ross filed a motion to amend the judgment against him on the ADA claim. The ISTA argues that the motion is untimely in that it should have been filed within ten days of the entry of judgment against Ross on that claim in February. While that argument has some appeal, this court will assume that the motion has been timely filed and address it on the merits.

Plaintiff asserts that this court based its decision in February on a decision of Judge Lee's in *Bollenbacher v. Helena Chemical Co.*, 934 F.Supp. 1015 (N.D.Ind. 1996), which Judge

Lee has revisited in *Moffitt v. Fibre Form Corp.*, No. 1:96cv310 (N.D.Ind. June 5, 1997). While Judge Lee's analysis of the interplay between the ADA and disability under the Social Security Act was helpful, this court's decision was based on the fact that Ross has consistently stated that he is toally disabled and entitled to long-term disability benefits, as well as Social Security benefits, except when he has argued for his rights under the ADA. This court did not find that Ross was estopped from making such an argument because of his receipt of Social Security benefits; rather, it determined that Ross' actions in obtaining Social Security and long term disability benefits were evidence that he was not a qualified individual with a disability, and thus not entitled to the protection of the ADA. Judge Lee's subsequent ruling in *Moffitt* and the EEOC Guideline which Ross has presented do not conflict with this court's prior holding and do not persuade it to amend the same.

The litigation has been in the hands of first-rate lawyers, for which this court is exceedingly grateful. It has likewise been given careful and thorough consideration by this court at every stage. This court has now made its various decisions on the basis of an extensive record and has fully explained its reasoning in detail and in writing. This court is now asked to revisit critical and important decisions made at various stages in this case. Such is now denied. All concerned here are now entitled to a final appealable judgment which shall be entered instanter in accord with the various rulings made by this court. This court has given this case its best shot and will most respectfully decline to revisit the various bases for its decision.

C. Conclusion

The clerk of this court is now **ORDERED** to correct the record to reflect an August 13, 1997 filing date for plaintiff's

Appendix A

Motion to Amend Judgment and brief in support thereof, Bill of Costs, and Motion for Attorney's Fees, docket numbers 92, 93, 94 and 95. Ross' Motion to Amend Judgment is now **DENIED.**

IT IS SO ORDERED.

Dated: September 24, 1997

s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT OF INDIANA